

The preliminary hearing record establishes that the claimant has a right knee injury. An MRI was performed on May 4, 1995 that showed an extensive complex tear of the medial meniscus and a tear in the cruciate ligament of claimant's right knee. However, the Administrative Law Judge found, after personally observing and hearing the testimony of all the witnesses at the preliminary hearing, that the claimant had failed to prove that his right knee injury arose out of and in the course of his employment with the respondent. Claimant argues that he did present credible evidence that proved that his right knee injury was a result of an accident that occurred while he was working for the respondent and requests that the Appeals Board reverse the Administrative Law Judge's Order. On the

other hand, respondent argues that the Administrative Law Judge's Order should be affirmed, as the claimant failed to prove his right knee injury arose out of and in the course of his employment.

On the date of claimant's alleged accident, April 12, 1995, claimant had been employed by the respondent as a package pickup worker since July 1994. Claimant alleges that he injured his right knee on this date, shortly after he started his regular shift at 12:00 p.m. Claimant also testified that he worked from 4:00 a.m. until 8:00 a.m. on his other job for Roadway Packages on April 12, 1995. Claimant described his job duties with the respondent as locating merchandise purchased by customers from storage racks and taking the merchandise to an area for the customer to pick up. Claimant contends that he injured his right knee when he slipped and fell from the highest step on a six to seven (6-7) foot ladder while locating and retrieving boxes containing part of a Sunbeam five-piece (5) lounge set. No one witnessed the alleged accident. Claimant testifies that he reported the accident to the respondent and was sent by respondent for medical treatment on the day of the accident. Claimant was treated conservatively at the Wesley Medical Center Occupational Health Service, until respondent denied his claim. The medical records indicate that the claimant was treated by David Durand, D.O., who last saw the claimant on May 10, 1995.

Brenda Hendrickson, loss prevention supervisor for the respondent, testified that she investigated claimant's alleged accident. Ms. Hendrickson established that she was present when the claimant reported his accident and knew respondent referred the claimant for examination to the Wesley Medical Center. Ms. Hendrickson identified a cash register tape, that was admitted into evidence at the preliminary hearing, which contained a record of all the merchandise that came through the package pickup area where the claimant was employed on the date of the accident. The cash register tape did not contain the record of a five-piece (5) lounge set being picked up on April 12, 1995. Photographs of the storage area where the claimant's accident allegedly occurred were also identified by Ms. Hendrickson and placed in evidence. These photographs were taken after the date the claimant claims his accident occurred, and the Appeals Board finds that this evidence is not persuasive and credible, and should not be considered in a determination of the issue on review before the Appeals Board.

Deb Young, a supervisor employed by the respondent for fifteen (15) years, testified that on the date of claimant's accident, April 12, 1995, she observed the claimant on his way to the time clock to clock in and that he appeared, at that time, to be limping. She verified that she was sure that she had observed the claimant prior to 12:00 noon because she recalls that she saw him before she took her regular lunch hour from 12:00 noon to 1:00 p.m.

The Administrative Law Judge had an opportunity during the preliminary hearing to personally observe and assess the credibility of all the witnesses that testified. In finding adverse to the claimant, the Administrative Law Judge had to determine that the testimony of the two (2) representatives of the respondent was more credible than the testimony of the claimant. Accordingly, for preliminary hearing purposes, since the Administrative Law Judge had the opportunity to personally assess the credibility of the witnesses, the Appeals Board affirms the Administrative Law Judge's Order that denied claimant benefits on the basis that his right knee injury did not arise out of and in the course of his employment with the respondent.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge John D. Clark, dated August 25, 1995, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, Kansas
Vincent A. Burnett, Wichita, Kansas
John D. Clark, Administrative Law Judge
Philip S. Harness, Director